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No. 90-7477

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,
Petitioner,

v.

RICHARD LANHAM, Commissioner, Maryland Department of Public Safety and Correctional Services, Division of Correction, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

CASES	PAGE
Alamo Chem. Transp. Co. v. M/V Overseas Valdes, 744 F.2d 22 (5th Cir. 1984)	4
Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989)	1
Coppedge v. United States, 369 U.S. 438 (1962)	3
Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172 (11th Cir. 1983)	2
Frace v. Russell, 341 F.2d 901 (3d Cir.), cert. denied, 382 U.S. 863 (1965)	1
Houston v. Lack, 487 U.S. 266 (1988)	3
McMillan v. Barksdale, 823 F.2d 981 (6th Cir. 1987)	3
O'Neal v. United States, 272 F.2d 412 (5th Cir. 1959)	3
Schlagenhauf v. Holder, 379 U.S. 104 (1964)	3
Tillman v. United States, 268 F.2d 422 (5th Cir. 1959)	3
Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988)	2, 4
West v. United States, 222 F.2d 774 (D.C. Cir. 1954)	3
STATUTES	
28 U.S.C § 2072 (1988)	3

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1. Respondent Barry asserts that accepting an appellate brief as the functional equivalent of a notice of appeal "effectively eliminates" the requirement for filing a notice of appeal. See Br. in Opp. i, 8, 13. This assertion overstates petitioner's argument. Circuits that allow appellate briefs to substitute for a notice of appeal do so only if the brief serves the purposes of the notice of appeal and has been filed within thirty days of the entry of final judgment. Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989); Frace v. Russell, 341 F.2d 901 (3d Cir.), cert.

denied, 382 U.S. 863 (1965).[1] A court determines that an appellate brief is the functional equivalent of a notice of appeal only if the purposes of Fed. R. App. P. 3 have been fulfilled. The only thing that is eliminated by the application of the functional equivalent analysis is the windfall that the respondents received when this appeal was dismissed on jurisdictional grounds.

2. Barry acknowledges that the courts of appeals that have addressed this issue are in conflict. Br. in Opp. 8-10. He claims however that the issue is too narrow to "merit the attention of the Supreme Court." Br. in Opp. 5. Petitioner urges the Court to conclude otherwise. A jurisdictional issue arising under the Federal Rules of Appellate Procedure is necessarily an issue of considerable significance to this Court. See, e.g., Torres v. Oakland Scavenger Co., 487 U.S. 312, 314 (1988) (we are "grant[ing] certiorari to resolve a conflict in the Circuits over whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of

[1] As stated in the Petition for Certiorari, it is not clear whether or not the Eleventh Circuit will allow an appellate brief to substitute as a notice of appeal. Pet. App. 11 n.6. Barry's heavy reliance on the Eleventh Circuit language that applying a functional equivalent test "effectively eliminates the requirement of filing a separate notice of appeal" is misplaced. See Br. in Opp. i, 8, 13. The Eleventh Circuit was referring to a situation where both the notice of appeal and the appellate brief were filed before the district court entered its final judgment. See Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172, 1172-73 (11th Cir. 1983). In such a situation, no document had been filed within the requisite thirty day period; thus, the circuit court held that to allow the appeal to go forward would eliminate the requirement for a notice of appeal altogether.

Appellate Procedure 3(c) presents a jurisdictional bar to the appeal"); see also Houston v. Lack, 487 U.S. 266 (1988). This is especially true given this Court's statutory responsibility to formulate and put the appellate rules in force. See 28 U.S.C. § 2072 (1988); Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964). The very right to have an appeal heard should not fortuitously hinge upon where the appellant files his appeal. In two Circuits, Smith's appeal could be considered on the merits but in three others, including the Fourth Circuit, the very same appeal must be dismissed for lack of jurisdiction. A conflict such as this is very much worthy of this Court's review.

3. Barry also argues that it is premature for this Court to consider this issue. Br. in Opp. 5-7. Were the court below the first or second court to address the issue, the point might have some persuasiveness but at least five circuits have now had the occasion to consider the issue and there is no reason to delay a decision from this Court.[2]

4. Respondent also claims that the decision below is based on

[2] In petitioner's view, the categorical approach that appellate pleadings should never be allowed to serve a double function as a notice of appeal is in conflict with at least one decision from this Court as well as other circuit decisions. See Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962) (citing Tillman v. United States, 268 F.2d 422 (5th Cir. 1959) (application to proceed in forma pauperis accepted as a notice of appeal); West v. United States, 222 F.2d 774 (D.C. Cir. 1954) (motion to proceed in forma pauperis accepted as a notice of appeal); O'Neal v. United States, 272 F.2d 412 (5th Cir. 1959) (appeal bond accepted as a notice of appeal)). Respondent cites a recent Sixth Circuit case where the court of appeals accepted a motion for a certificate of probable cause as the functional equivalent of a notice of appeal. Br. in Opp. 6-7 (citing McMillan v. Barksdale, 823 F.2d 981, 982-83 (6th Cir. 1987)).

unique facts which make it an inappropriate vehicle to resolve the circuit conflict that exists. Br. in Opp. 5, 10-12. This is incorrect. The court below did express concern that Smith's brief was filed at its request and that Smith had received advice from his former attorney that the appeal was premature. Pet. App. 3a-4a. The court below, however, decided the jurisdictional issue before it without relying on these factors. The court adopted the Fifth Circuit approach and unequivocally ruled that an appellate brief can never substitute as a notice of appeal in the Fourth Circuit. Pet. App. 4a ("an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4"). Thus, the factors that respondent suggests are "unique" to this case were ultimately irrelevant to the decision below.[3]

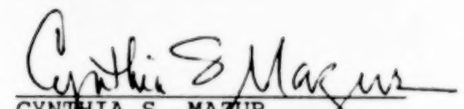
[3] The focus of the functional equivalent test is the document in question and its effect on the appellees and the court, not the degree of negligence of the appellant. Ironically, existing precedent suggests that the Fourth Circuit would have erred had it based its jurisdictional decision on whether or not the appellant had counsel or was otherwise charged with knowledge of the need to file a new notice of appeal. See Torres, 487 U.S. at 313 (omission of party's name from the notice of appeal was due to error by secretary employed by petitioner's attorney); Alamo Chem. Transp. Co. v. M/V Overseas Valdes, 744 F.2d 22, 23 (5th Cir. 1984) (applying a functional equivalent test to papers filed by counsel), cited in Br. in Opp. 7.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STEVEN H. GOLDBLATT
Attorney For Petitioner
Counsel of Record
Director



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April 1991

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

I HEREBY CERTIFY that on April 24, 1991, two (2) copies of the foregoing Reply Memorandum for Petitioner were sent, postage prepaid, to each of the following:

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STEVEN H. GOLDBLATT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-7477

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WAYNE S. BARRY, ET AL.,
Respondents.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 of the Supreme Court, the petitioner, William Lewis Smith, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs.

Undersigned counsel was appointed to represent Petitioner in the United States Court of Appeals for the Fourth Circuit.

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

STEVEN H. GOLDBLATT
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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEWIS SMITH,
Petitioner,

v.

JON P. GALLEY, ET AL.
Respondents.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

I, William Lewis Smith, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress. I sought and received from the United States Court of Appeals for the Fourth Circuit leave to proceed in forma pauperis.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? ✓ Yes ___ No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

[redacted] I receive $ 27.00 monthly, and I work at the Roxbury Correctional Institution in Hagerstown, Maryland. 21746. I am also an inmate at the prison

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other income? ____ Yes ___✓___ No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

____ Yes ___✓___ No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing?) ____ Yes ___✓___ No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SUBSCRIBED AND SWORN TO before me on this 25th day of February 1991.

X William L. Smith
William Lewis Smith

Donna Hayes
Donna Hayes, Notary
My Commission Expires: 1-1-93